Office-Supreme Court, U.S.
FILED
FEB 1 5 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CHICAGO AND NORTH WESTERN RY. CO., *et al.*, *Appellants*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.*

No. 576

On Appeal From the United States District Court for the Southern District of California

MOTION TO AFFIRM ON BEHALF OF APPELLEES SOUTHERN PACIFIC COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND OTHERS

E. P. PORTER
Rio Grande Building,
1531 Stout Street,
Denver, Colo. 80217

ALAN C. FURTH
CHARLES W. BURKETT
ROBERT L. PIERCE
65 Market Street,
San Francisco, California 94105

THORMUND A. MILLER
205 Transportation Building,
17th & H Streets, N. W.,
Washington, D. C. 20006

Attorneys for above Appellees

February 15, 1966

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CHICAGO AND NORTH WESTERN RY. CO., *et al.*, *Appellants*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.*

No. 159

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees.*

No. 576

On Appeal From the United States District Court for the Southern District of California

---

MOTION TO AFFIRM ON BEHALF OF APPELLEES SOUTHERN PACIFIC COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND OTHERS

MOTION TO AFFIRM

Appellees Southern Pacific Company, The Denver and Rio Grande Western Railroad Company and other plaintiffs and intervener plaintiffs in the court below as listed in Appendix A move pursuant to Rule 16 of the

revised rules of this Court that the judgment of the District Court be affirmed to the extent it has not already become moot.

STATEMENT

These are appeals (by midwestern railroads in No. 159 and by the United States and the Interstate Commerce Commission in No. 576) from the final judgment of a three-judge Federal District Court for the Southern District of California, on suit of mountain-Pacific railroads, including these Appellees, setting aside orders of the Interstate Commerce Commission, which prescribed new divisions of rail rates on transcontinental freight traffic. The Commission prescribed new divisions of joint rates on eastern and mountain-Pacific transcontinental freight traffic substantially more favorable to the eastern lines than the existing divisions. (B&O J.S. 111a-113a, 162a-165a) New divisions were also established on transcontinental traffic originating and terminating in midwest territory and for midwestern lines participation as intermediate carriers of traffic moving between eastern (official) and mountain-Pacific territory. (B&O J.S. 114a-117a, 167a-170a) These divisions benefited the great majority of the midwestern lines. The eastern railroads appealed from this same judgment in No. 143.

Subsequent to the three appeals to this Court a settlement agreement was reached between all the Appellee mountain-Pacific railroads, including each of these Appellees, and all of the eastern railroads, Appellants in No. 143, with respect to all divisions between them covered by the Commission's orders and providing for different divisions from those prescribed by

the Commission.* On October 20, 1965, the settling eastern and mountain-Pacific railroads, including each of these Appellees, filed a joint petition with the Commission requesting that in view of this agreement the Commission vacate its orders insofar as they prescribe divisions as between the settling eastern and mountain-Pacific carriers (those which would have been subject to Appendices B and B-1 to the Commission's orders). On January 7, 1966, the Commission granted this petition and ordered vacation of its previous orders in the respects requested. These Appellees have filed a separate memorandum in Nos. 143 and 576, suggesting that such vacating order of the Commission rendered the appeal in No. 143 moot and the appeal in No. 576 partially moot.

Also, subsequent to the three appeals to this Court a similar but separate settlement agreement was entered into between the mountain-Pacific railroads, including these Appellees, and a number of the midwestern railroads, providing for the application of divisions between the parties other than those prescribed by the Commission in Appendices C and C-1. The midwestern railroads, who are parties to this settlement agreement represent approximately two-thirds of the midwestern participation in transcontinental traffic, but although this settlement agreement specifically provides that it is open to all midwestern railroads on the same terms, a number of the midwestern railroads refused to sign it, including all of the nine Appellants in No. 159 except

---

* For copy of the agreement see Appendix B to Memorandum Suggesting that the Cause in No. 143 is Moot and that the Cause in No. 576 is Partially Moot filed February 15, 1966, on behalf of the Atchison, Topeka and Santa Fe Ry. Co. et al.

Chicago, Rock Island and Pacific Railroad. On January 21, 1966, the mountain-Pacific railroads, including these Appellees, and the settling midwestern railroads filed a joint petition with the Commission asking it to vacate its orders insofar as they would apply to the revenues of the assenting midwestern railroads. On January 26 the non-assenting midwestern railroads filed a reply urging that the petition be denied. The matter is now pending before the Commission.

ARGUMENT

The Judgment Should Be Affirmed Because the Questions on Which the Decision of the Cause Depends Are so Unsubstantial as Not to Need Further Argument.

For all the reasons set forth in the separate motion to affirm of the other Appellee mountain-Pacific railroads, to which these Appellees fully subscribe, it is plain that the decision of the District Court is correct and that issues posed by these appeals are manifestly unsubstantial and without merit.

Section 8(b) of the Administrative Procedure Act makes it incumbent upon the Commission in all decisions to include a statement of ". . . findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . ." (5 U.S.C. § 1007(b)). Having disclaimed that the cost evidence provided a basis for prescribing divisions for the future, the Commission stated that these divisions must reflect the "broader aspects of revenue need." (B&O J.S. 95a). Although having expressly determined that the prescribed divisions should reflect revenue needs, the Commission did not make findings as to what the revenue

needs of the carriers were, either on a group or individual basis. Nor did it find what effect the prescribed divisions would have in meeting the asserted needs of the carriers. Appellants urge that the rate of return comparisons fill the gap. (CNW J.S. 16-17) It will be apparent from the Commission's decisions that it did not fix new rates of return that would reflect the requirements of Section 15(6), nor did it find that the prescribed divisions would result in specified rates of return.

The insubstantial nature of the appeal in No. 576 is amply demonstrated by the fact that the Commission in a recent decision abandoned the illegal procedures which it still supports in this appeal and made the very type of detailed basic findings which the District Court in the present case found it was derelict in its duty in failing to make. *Official-Southern Divisions,* 325 I.C.C. 1 (1965). (See discussion in Motion to Affirm of Other Mountain-Pacific Railroad Appellees, pp. 3, 13).

As pointed out at page 27 of that Motion, Denver and Rio Grande Western Railroad is one of the three atypical lines upon which the Commission's orders had especially severe financial impact. Because the new divisional structure split competitive routes, the Rio Grande would be caught in a special competitive squeeze that would deprive it of substantially all its income. In view of these circumstances, as fully and completely set forth in that Motion (pp. 23-31), the Commission was required to make findings as to the financial impact of the new divisions upon it, yet the Commission unlawfully failed to do so.

CONCLUSION

For the foregoing reasons the District Court's judgment should be affirmed without plenary consideration.

Respectfully submitted,

E. P. PORTER
Rio Grande Building
1531 Stout Street,
Denver, Colo. 80217

ALAN C. FURTH
CHARLES W. BURKETT
ROBERT L. PIERCE
65 Market Street,
San Francisco, Calif. 94105

THORMUND A. MILLER
205 Transportation Building,
17th and H Streets, N. W.,
Washington, D. C. 20006

Attorneys for above Appellees

February 15, 1966

APPENDIX A

List of Appellees on Whose Behalf This Motion to Affirm is Filed

Amador Central Railroad Company
The Arcata and Mad River Rail Road Company
California Western Railroad
Camino, Placerville & Lake Tahoe Railroad Company
The Denver and Rio Grande Western Railroad Company
Holton Inter-Urban Railway
Inter-California Railway Company
Klamath Northern Railway Company
McCloud River Railway Company
Magma Arizona Railroad Company
Nacozari Rail Road Company
Northwestern Pacific Railroad Company
Pacific Electric Railway Company
Petaluma and Santa Rosa Railroad Company
San Diego & Arizona Eastern Railway Company
Santa Maria Valley Railway Company
Sierra Railroad Company
Southern Pacific Company
Tijuana and Tecate Railway Company
Trona Railway Company
Tucson, Cornelia and Gila Bend Railroad Company
Ventura County Railway Company
Visalia Electric Railroad Company
Yreka Western Railroad Company